

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

M. DIANE KOKEN, AS LIQUIDATOR)	
ON BEHALF OF RELIANCE INS. CO.)	
(IN LIQUIDATION),)	
)	
Plaintiff,)	
)	
v.)	
)	Civil No. 02-83-B-C
)	
AUBURN MANUFACTURING, INC.,)	
ET AL.,)	
)	
Defendants.)	
_____)	

ORDER AFFIRMING THE
RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge having filed with the Court on August 20, 2004, with copies to counsel, her Recommended Decision on Auburn Manufacturing, Inpro, Redco and O'Connor's Motion for Summary Judgment (Docket Item No. 282); and Plaintiff having filed its Objection on September 7, 2004 (Docket Item No. 287); and Defendant, Black & Veatch Construction, Inc., having filed its Objection thereto on September 7, 2004 (Docket Item No. 288); and the parties having filed Responses to said Objections (Docket Item Nos. 293 and 295-97); this Court having reviewed and considered the Magistrate Judge's Recommended Decision on said dispositive Motions, together with the entire record; and this Court having made a de novo determination of all matters adjudicated by the Magistrate Judge's Recommended Decision on said dispositive

Motions; and this Court concurring with the recommendations of the United States Magistrate Judge on resolution of the dispositive Motions for the reasons set forth in her Recommended Decision; and having determined that no further proceeding is necessary;¹ it is **ORDERED** as follows:

- (1) The Objections of the Plaintiff and of the Defendant to the Recommended Decision on the dispositive Motions are hereby **DENIED**;
- (2) The Recommended Decision of the Magistrate Judge on said Motion is hereby **AFFIRMED**;
- (3) The Motions of Defendants Auburn and Inpro for Summary Judgment are hereby **GRANTED**. Judgment to be entered in favor of those Defendants thereon;
- (4) The remaining Summary Judgment Motions (Docket Item Nos. 163, 175, and 177) are **DISMISSED** as **MOOT**;

¹ The parties, in their continuing pattern of procedural obfuscation in this case, have failed to note the difference under 28 U.S.C. § 636(b)(1) between an action of the Magistrate Judge on a dispositive motion under § 636(b)(1)(B), which results in a Recommended Decision by the Magistrate Judge and an action on a non-dispositive motion under § 636(b)(1)(A) which results in a positive action disposing of the motion. This dichotomy yields significant differences in procedure that should be observed by counsel. See Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 594 F. Supp. 583 (D. Me. 1984). Parties seeking review of the Magistrate Judge under § 636(b)(1)(B) are required to file objections to the Recommended Decision and the Article III Judge conducts a de novo review of the Recommended Decision. On the other hand, parties seeking review of an action of the Magistrate Judge under § 636(b)(1)(A) are required to file a Notice of Appeal from the action of the Magistrate Judge and the Article III Judge reviews the action for the existence of “clear error.”

Here, the parties have sought Article III review of both types of actions but have entitled all their papers seeking to initiate those reviews “Objections” to the actions of the Magistrate Judge. This confuses the docket and record. Jacobsen, 594 F. Supp. at 585 (“The initiating pleading seeking...[§ 636(b)(1)(A)] review is properly designated as a Notice of Appeal”) and at 586 (“In the future, the procedural distinction should be observed by counsel. The filing of an appropriately captioned pleading seeking review of the action of the Magistrate facilitates the expeditious identification by the Court of the appropriate standard of review and procedural posture of the case.”).

This failure to recognize the proper procedure raises in the Court’s mind, moreover, concern that counsel in this case may fail to appreciate the two separate standards of review that will be applied to the various actions of the Magistrate Judge. The Court feels constrained to point this out to counsel who do not regularly practice in this Court in order to bring clarity to their perception of the various reviews of the numerous actions of the Magistrate Judge that the Court herewith undertakes to conduct which might otherwise escape the notice of such determined counsel.

- (5) It is hereby **ORDERED** that judgment be, and it is hereby, **ENTERED** against the claims asserted in Reliance's Second Amended Complaint for failure of Reliance to generate any genuine issue of material fact on the existence of any duty or breach of duty or causation of any injury by any breach of duty, if one occurred, and because Reliance has waived any contract warranty claim, and;
- (6) It is hereby **FURTHER ORDERED** that judgment be, and it is hereby, **ENTERED** against the claims asserted in the Cross-Claim of Black & Veatch for the same reasons as set forth in subparagraph (5) immediately above.

/s/Gene Carter_____
GENE CARTER
Senior District Judge

Dated at Portland, Maine this 15th day of October, 2004.

Plaintiff

-

**M DIANE KOKEN, as
Liquidator on behalf of
Reliance Insurance
Company (in
liquidation)**

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V.

Defendant

PYRO SHIELD INC
TERMINATED: 11/04/2002

REDCO/O'CONNOR INC
TERMINATED: 08/05/2002

**BLACK & VEATCH
CONSTRUCTION, INC**

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REDCO/O'CONNOR

ThirdParty Plaintiff

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V.

ThirdParty Defendant

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Cross Claimant

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TERMINATED: 11/19/2002

Cross Claimant

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V.

Cross Defendant

PYRO SHIELD INC

TERMINATED: 11/19/2002

REDCO INC

TERMINATED: 09/11/2002

dba

REDCO/O'CONNOR

Defendant

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V.

Cross Defendant

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INC**

INPRO INC

Cross Claimant

**AUBURN MANUFACTURING
INC**

V.

Cross Defendant

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INPRO INC

O'CONNOR CONSTRUCTORS
INC

REDCO INC

Cross Claimant

O'CONNOR CONSTRUCTORS
INC

V.

Cross Defendant

AUBURN MANUFACTURING
INC

Cross Claimant

REDCO INC

V.

Cross Defendant

AUBURN MANUFACTURING
INC

Cross Claimant

REDCO INC

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Cross Defendant

INPRO INC

Cross Claimant

INPRO INC

V.

Cross Defendant

**AUBURN MANUFACTURING
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**O'CONNOR CONSTRUCTORS
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REDCO INC

REDCO/O'CONNOR INC

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